



## SETTLING FRANCHISE DISPUTES THROUGH MEDIATION IN MALAYSIA

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**Abstract:** *Business opportunities come in many ways and among the most popular one is franchise business. It is built on a long-term relationship which requires trust and full support between the franchisor and the franchisee. Similar to any business relationship, franchise business is also exposed to disputes and friction due to miscommunication or other disagreements between franchisor and franchisee. In the event of disputes, the parties normally resort to type of settlements which are not burdensome to them. They tried as much as possible to settle it and often seek a commercial solution in order to avoid high cost and inconvenience of litigation process. In doing so, parties are more comfortable to overcome their disputes through mediation. Mediation is a voluntary process where an independent third party, called mediator assist the disputing parties to facilitate the negotiation in order to reach satisfactory outcome. This paper aims to study the mediation process conducted in franchise dispute and examine its advantages and disadvantages in settling the disputes between franchisor and franchisee.*

**Keywords:** *Franchise Disputes, Mediation, Mediator, Advantages, Disadvantages*

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### Introduction

It is generally understood that in any franchise relationship, there has potential for friction but the complicated and complexity nature of franchise relationships make them particularly susceptible to dispute. Franchise disagreements can arise in a number of situations such as when there are changes in relationship between the franchisor and the franchisee, alterations to their commitment and expectations, difference in their respective bargaining power and economic conditions and change in the trading market itself (Andrew, 2016).

Franchise is defined in section 4 of the Franchise Act 1998 as a contract or an agreement, either expressed or implied, whether oral or written, between two or more persons by which

the franchisor grants to the franchisee the right to operate a business, right to use any intellectual property, the franchisor possess the right to administer continuous control during the franchise term over the franchisee's business operations, and in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration. This definition implies that the business relationship between the franchisor and franchisee is determined by the terms of the contract agreed by both parties and bound by their specific rights and duties between them.

As mentioned earlier, disputes or disagreements are common in any relationship and franchise is no exception. When disputes arise, parties will try to settle them either through lawsuits (litigation), arbitration, collaborative law, mediation, conciliation, negotiation and facilitation. However, people usually seek a commercial solution in order to avoid high costs and inconvenience of litigation. One of the best methods commonly used by the disputing parties especially in franchise relationship is mediation.

Section 3 of Mediation Act of Malaysia 2012, defines "mediation" as a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute. In other words, it is a voluntary process with the presence of a mediator to offer help and assistance for the parties to settle disputes.

Hence, mediation is a voluntary process where an independent third party, called mediator assists the disputing parties working together to reach a satisfactory agreement. It is the mediator role to facilitate the negotiation and creates a safe environment for the parties to address the issues involved in the disputes.

The mediation process is very flexible. It is a quick process involves the coming into a mutually acceptable agreement to settle the dispute by both sides of the parties. It is a process for individuals or groups, who are in any type of conflict, to work with a mediator to discuss the problems, identify the key issues and explore practical ways to resolve or manage the conflict. No matter how complex or entrenched a matter is, mediation is a powerful tool to assist parties to resolve their differences and find a way to positively move forward (Mediate BC, 2018).

Mediation is seen as powerful alternatives to the process of court of law for franchise disputes for number of reasons. Firstly, in mediation the parties themselves have input, and the resolution becomes more meaningful and effective when all sides mutually contribute to it (Mediate BC, 2018). On the other hand, litigation can be polarizing, whereas mediation aims to preserve business relationships. Whether the dispute is with a valuable client or an important supplier, mediation focuses on resolving the matter in a way that keeps relationships intact. Mediators will assist discussion to promote respect and common goals, and generate creative ideas to resolve the dispute. In mediation parties are free to come up with their own solutions and they do not confine to the parameters of a potential judgment from the court (Mediate BC, 2018).

The objective of this paper is to analyse mediation as an alternative to the litigation process for franchise disputes. This paper also discusses the relevant law for mediation, its advantages and disadvantages as one of the successful alternative dispute resolution particularly in franchise disputes.

## **Literature Review**

### ***Mediation as A Tool in Resolving Franchise Disputes***

Mediation is a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute. In other words, it can be defined as a voluntary process with the presence of a mediator to provide assistance for the parties to settle disputes. It is an action in mediating between parties, as to affect an agreement, settlement or reconciliation.

In Malaysia, mediation has been practiced for centuries. The law governs mediation is Mediation Act 2012 (hereinafter referred as 'MA'). The main objective of this Act is to encourage and promote mediation to facilitate the dispute settlement in an impartial as well as time and cost-effective way. Moreover there are many institutions govern mediation process and one of the institutions which facilitate and assist in the mediation processes particularly deals with franchise dispute is Malaysian Mediation Centre (hereinafter referred as "MMC") which was established under Malaysian Bar Council in 1999.

### ***Process of Mediation in Malaysia***

The process of mediation in Malaysia is governed by Mediation Act 2012. The usual mediation process would involve the parties, i.e. the franchisor and the franchisee and Mediator in which meeting will be held together, at scheduled sessions as determined by the parties.

Briefly, most mediation generally runs by the following five-stage format. Firstly the mediator and the parties would agree to a number of guidelines that they will follow in the mediation. This usually allowing one person to speak at a time, treating all parties with respect, and confidentially (Malaysian Mediation Centre, 2018). Secondly, the parties usually make their initial statements regarding their disagreement or any dispute and define what they hope to resolve at the mediation.

Thirdly, each party discusses their interests and possible solutions to resolve their disagreement with assistance of the mediator. Fourthly, the mediator may hold private and confidential sessions with each party to assist in determining further interest or discussing possible resolution. Lastly, is finalizing a resolution in which the parties assisted by the mediator create a resolution mutually agreeable to both parties (Malaysian Mediation Centre, 2018). Once mediation successful the settlement agreement will be draw and binding upon the parties.

The goal for mediation is resolution rather than the best positioning for trial. Disclosure is important if parties are to fully understand each other and once parties have had a chance to fully discuss issues, resolution becomes a real possibility and the disputes can be settled peacefully (Mediate BC, 2018). Even if the mediation does not fully resolve the dispute, afterward parties often gain clarity, improved communication or even partial solutions.

However there are several disadvantages of mediation such as the decision is not binding upon parties and thus it perceived to be weak decision. Another disadvantage is when the mediation process is not successful much valuable time will be wasted and the cases will nevertheless have to be fixed for trial (Kwai, 2012). Even though there are some

disadvantages in mediation but mediation still appears to be the most successful and popular form of alternative dispute resolution adopted particularly in franchise industry in arriving at a solution to a dispute expeditiously and amicably.

### **Methodology**

In this study the types of research methods used are doctrinal and descriptive. This paper incorporates a report, description and narration of how mediation process works and what happens in a mediation process. Analytical approach is adopted in which a critical evaluation and an analysis of all the available materials and information with regard to the mediation process is presented.

In addition, this paper is written based on data collected from various primary and secondary sources. The primary sources of research to be used in this study are data and records of various mediation centers, the gazette statutes, act, cases and law reports while the secondary sources of research to be used are books, articles in journals and internet database.

### **Analysis and Findings**

#### ***Advantages of Mediation***

Basically, mediation offers many advantages, and can be effective at early stages of franchise disputes to encourage early and cost-effective resolution. Mediation offers particular benefits for disputes between franchisors and franchisees where there is a mutual interest in preserving an ongoing franchise relationship. Through mediation, the parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker (Rilley, 2011). Besides that, by choosing to mediate, the disputing parties may avoid the substantial monetary costs and expenses for bringing the matter to court. In addition it may save valuable time and effort of disputing parties through the avoidance of prolonged trial and post-trial proceedings in court.

Moreover, in mediation the parties have a greater degree of control over the outcomes and the methods in negotiating a resolution that can address each of the parties' interests. A mediator will be appointed by both parties not to decide who is right or who is wrong but may make suggestions for resolving the dispute (Goldman, 2016).

The advantages are:-

#### ***Low Costs and Affordable***

Mediation is generally less expensive particularly when compared to the expense of litigation. By choosing to mediate, the disputing parties may avoid the substantial monetary costs and expenses for bringing the matter to court. It also may save valuable time and effort of disputing parties through the avoidance of prolonged trial and post-trial proceedings in court.

Even though mediation requires some time investment by the parties, however if a resolution can be reached, it may cut the costs and expenses for having to pursue arbitration or litigation. Compared to arbitration or litigation, the cost is expensive and often takes much longer to complete in resolving disputes (Rilley, 2011). Besides that, arbitration and litigation occur in a series of short or incomplete segments and never ending sessions, in which there exists constant starting and stopping of proceedings which can cause unanticipated expenses such as getting ready to start the arbitration or litigation again, preparing and transporting witnesses,

getting witnesses ready to testify and trying to fit them into the changing schedule (Klarfeld, Lewis & Silverman, 2009). Moreover, the lawyer needs to spend more time and the client needs to spend more money on lawyers' fees.

Besides that, the cost of mediation is relatively low because it requires a limited expenditure of time in which the mediator will directly focus on the issues, facts, and legal arguments involved. Moreover the attendance by counsel and all the parties involved at a mediation session will last no more than a day or two (Klarfeld, Lewis & Silverman, 2009). Compared to litigation, it requires more time and cost for preparing the cause paper and documents, attending case management before the trial, securing witnesses in court, and the clients need to spend more money for legal fees. It clearly shows that mediation can be very cost-effective.

### ***Mutually Satisfactory Outcomes***

Mediation does not result unsatisfactory outcomes to the disputing parties in which one party wins and the other party loses, but instead bring satisfactory outcomes to both parties. The outcomes of the disputes are mutually agreed by both parties. Through mediation, the parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker. Both parties are interdependent to each other since the outcomes cannot be achieved without mutual interests (Rilley, 2011).

In mediation, during mediation session the parties themselves make decisions, set the deadlines, sharing information, obtaining expert opinions when necessary and holding negotiations (Rilley, 2011). It is the parties themselves who have reached their own agreement in mediation and they are more likely to follow and comply with its terms. A mediator only facilitates the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute.

Unlike litigation where the decision is rendered by the judge who is not a party to the disputes and the judge himself has a little knowledge and understanding of the franchise business (Rilley, 2011). Thus decisions delivered by the judge sometimes bring unsatisfactory outcomes to the parties. However through mediation the disputing parties will make the resolutions upon mutually agreed by them in which they have a direct impact and knowledge of their business.

Furthermore, agreements are better than simple compromise outcomes. In order to achieve satisfactory outcomes, both disputing parties must mutually agree upon the common interests and will receive common profits from it. Interest-based mediated negotiations can result in settlements more satisfactory to both parties than simple compromise decisions.

### ***Preservation of An Ongoing Relationship***

Duty of the mediator is assisting the disputing parties to understand each other's grievance, facilitate discussion and compromise to an agreement but not to direct the parties to a predetermined outcome (Goldman, 2016). Unlike the decision delivered by the courts in which one party winning and the other losing, the outcome of mediation are different in which in mediation, both parties will get fairly result at the end of mediation. Many disagreement or dispute occur in the context of relationships will prolong over future years. However mediation often appear as one of the alternative dispute resolution that can preserve a working relationship in which by mediated settlement it can address all parties' interests in ways that would not be possible in a court decision-making procedure.

Moreover, through mediation it assists both disputing parties preserve valued business relationship with minimal risk. The parties may discuss their disputes or disagreement in the franchise business without fear their discussion or statement will result in a negative result by a judge. The mediation processes give opportunity to any one of the party to express their frustration to the other party regarding their franchise agreement and also give right to be heard to the opposing party, to communicate their business concerns and to formulate proposals in order to reach satisfactory outcomes (Goldman,2016).

Besides that, the mediator plays an important role by using his ability to separate the current emotions of the disputing parties from the business problems. If the mediator success in facilitating the parties to a fair and win-win situation outcome, it can actually preserve the parties future relationship in franchise business (Klarfeld, Lewis & Silverman, 2009). It means that both parties are mutually agreed to the resolution without anyone being forced by a court's decision. In addition the bond between franchisor and the franchisee may be strengthened and thus it may preserve their relationship in the future.

### ***Flexibility***

Mediation is flexible unlike attending court which has many procedural needs to follow. Mediations are held in a meeting room with parties seated around a table. Normally the parties will set their time and place for the mediation meeting with the assistance of the mediator unlike litigation where the date for hearing has been fixed by the court. By being personally involved in resolving the dispute, the parties are in control of the outcome and not by a third party decision-maker (Kwai, 2012). This is because the parties are the one who have direct impact on the franchise business. Moreover, it enables solutions to be more flexible, creative and business driven.

The parties also can attend mediation in person if they wish. There is no requirement that each party must have a legal representative to attend the meeting. However, it depends on the issues in dispute, for example if the dispute is concerning the rights in which the parties do not have knowledge on that area so it is useful to have a lawyer involved (Newton, 2011). Nevertheless, by engaging a lawyer it causes an additional cost to the parties. Essentially, through mediation the parties who negotiate their own settlements have greater degree of control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated in which it depends on the court's decision based on the evidence adduced.

Furthermore, through mediation the parties may negotiate on their terms in the agreement. The parties often feel more powerful than those who use advocates to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence unlike those who engaging advocates to represent them, which the outcome sometimes be influenced by the views or opinions of the advocates.

### ***Potential for Creative Crafting of Settlements***

Mediation is the process where the disputing parties come together in order to resolve their differences or conflicts with the assistance of a mediator. The decision of mediation is non-binding. Mediation also offers an alternative to dispute resolution whereby both parties seek to resolve a dispute in a less adversarial manner.

In mediation the parties have a greater degree of control over the outcomes and the methods in negotiating a resolution that can address each of the parties' interests. A mediator will be appointed by both parties not to decide who is right or who is wrong but may make suggestions for resolving the dispute. A mediator also helps parties to save time, expense, and uncertainty for both sides by suggesting a solution to avoid the further expense and unpredictability of an appeal.

In negotiating into settlement the parties can decide amongst themselves how to minimise payment by being creative in how the settlement is structured for tax purpose, the method of payment, protection of confidentiality and reducing adverse publicity (Goldman, 2016). Besides that mediated agreements can include specially tailored procedures for how the decisions will be carried out. This fact may enhance the likelihood that parties will actually comply with the terms of the settlement.

Furthermore, in negotiating into settlement, a mediator can explore factors which are outside the complaint of the parties and a mediator can look into the broader outline of the parties' relationship in order to resolve the deadlocks (Klarfeld, Lewis & Silverman, 2009). In contrast, if matters resolved in court, they are restricted only to focus on the merits of claims presented. Therefore, mediation appears to be more potential for creative crafting of settlements.

#### ***High Success Rate for Resolving Franchise Disputes***

In dealing with franchise business, mediation often appears as one of successful alternative dispute resolutions. In mediation the success in negotiate into settlement depends on the agreement of the parties rather than any particular substantive outcome. Statistics normally show that the success rate in mediations in franchise dispute is relatively high, for example in USA, the Franchise Mediation Program administered by the International Institute for Conflict Prevention and Resolution ("CPR") reported that success rates in excess of 80% for its mediations (Goldman, 2016).

Besides that, in USA, National Franchise Mediation Program ("NFMP") is conducting a case study on mediation activity among the franchisors and franchisees in order to corroborate the success of mediation in the franchise industry. This non-profit organization committed to using mediation to resolve disputes between franchisors and franchisees (Goldman, 2016).

#### ***Disadvantages of Mediation***

Despite its advantages, there are several disadvantages of mediation such as lack of experience and knowledge of the mediator. In mediation, the parties to the dispute may choose their own mediator to facilitate them in negotiation in order to reach satisfactory outcome (Goldman, 2016). Sometimes, the mediator appointed by the parties does not have any experience and knowledge on the subject matter and thus it may contribute to the unsuccessful mediation.

Another disadvantage is when the mediation process is not successful much valuable time will be wasted and the cases will nevertheless have to be fixed for trial. This is because mediation does not guarantee a resolution to the dispute. There may even be no resolution at all. A mediator has to view each case in the context of the nature of the case, the disputants and their lawyers. More time would be spent, especially on cases which may eventually turn

out to be mediation-unfriendly, and thus the time is consumed (Mohamed Ishak & Nik Azahani, 2016).

Furthermore, mediation does not create precedents, and so does not assist in similar recurring disputes. Each dispute will have to be resolved again and again. It seen that mediation does not assist in the development of our common law. Mediator also will face some difficulties in facilitating the disputes as there are no precedents to be followed (Mohamed Ishak & Nik Azahani, 2016).

In short, mediation does have disadvantages as follows:-

#### ***Cost and Delay***

One of the disadvantages of mediation is it will waste time and cost if the mediation process is not successful. Much valuable time will be wasted and the cases will nevertheless have to be fixed for trial. This is because mediation does not guarantee a resolution to the dispute. There may even be no resolution at all. A mediator has to view each case in the context of the nature of the case, the disputants and their lawyers. More time would be spent, especially on cases which may eventually turn out to be mediation-unfriendly, and thus the valuable time is consumed (Mohamed Ishak & Nik Azahani, 2016).

Even though the cost and delay of unsuccessful mediation are relatively small compared to the overall cost and time consumed by litigation or arbitration, mediation does entail preparation, education of the mediator, and attendance at the mediation session. All of these involve cost to the parties and time consuming if the mediation fails.

#### ***Mediation Does Not Create Precedents***

Mediation does not create precedents, and so does not assist in similar recurring disputes. Each dispute will have to be resolved again and again. It seen that mediation does not assist in the development of our common law. Mediator also will face some difficulties in facilitating the disputes as there are no precedents to be followed (Mohamed Ishak & Nik Azahani, 2016).

#### ***Lack of Experience and Knowledge of The Mediator***

In mediation, the parties are free to pick a mediator of their own choice (Goldman, 2016). Sometimes the mediator appointed by the parties is not legally trained to handle franchise dispute. Lack of experience and knowledge pertaining to the issue in dispute may contribute to the failure of mediation. Even though there are some disadvantages in mediation, however, by adopting mediation is still far better than litigation in arriving at a solution to a franchise dispute.

#### **Conclusion**

Therefore, in conclusion mediation may never solve every franchise or small business dispute, but it will give both parties to a dispute the best possible chance of resolving it more quickly and at lower cost and less stress than arbitration or litigation.

The results of mediation become more meaningful and effective when all sides mutually contribute to it. It focuses on resolving the matter in a way that keeps relationships intact. Mediator assists outline the discussion to achieve common goals, and generate creative ideas



to resolve the dispute. In mediation, it is not confined to the parameters of a potential judgment from the court, but the parties are free to come up with their own solutions.

Mediation also encourages the open flow of information unlike litigation in which the goal of mediation is resolution, rather than the best positioning for trial. Disclosure is vital if parties are to fully understand each other and once parties have had a chance to fully discuss issues, resolution becomes a real possibility.

The parties in mediation retain control over decisions affecting their matters and the outcomes and results are tailored to the parties' needs and interests. The decision is based on the mutual interests agreed upon between the disputing parties thus creating an opportunity for relationships to be preserved and even enhanced by the process in a way that litigation can never achieve.

In negotiating mediation, both parties will profit from the discussion. Mediation gives parties to control over the process. Mediator was appointed not to make decision for the dispute but rather to assist parties in reaching satisfactory outcomes and suggesting options for settlement of disputes. The process of mediation is likely to achieve the aim of a just, expeditious and economical disposal of the dispute.

Based on the above advantages and benefits of mediation to disputing parties particularly in franchise business, it is apparent that this method of dispute settlement will be a chosen one in the future.

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## Statute(s):

Franchise Act 1998  
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